

Submission on Constitutional Protection for the Public Ownership of the Public Water Infrastructure/system to the Joint Committee on the Future Funding of Domestic Water Services

The Joint Committee on the Future Funding of Domestic Water Services

It is recognised that a Special Committee was appointed by Dáil Eireann and a Special Committee was appointed by Seanad Eireann to form the Joint Committee on the Future Funding of Domestic Water Services [hereafter known as the Joint Committee]. The Joint Committee will consider the Report of the Expert Commission on the Future Funding of Domestic Water Services and will report with recommendations to both Houses of the Oireachtas by the 28th February, 2017, or within three months of its first public meeting whichever is later¹.

Recommendation of the Expert Commission on Public Domestic Water Services on Public Ownership

This submission relates in particular to the examination by the Joint Committee of the following recommendation of the Expert Commission on Public Domestic Water Services:

The Expert Commission recommends that the adoption of a suitable constitutional provision on public ownership of water services be more fully addressed by the Special Oireachtas Committee in its deliberations on this report²

The Expert Commission formed the view that further measures to the existing legislative safeguards on public ownership were required to 'alleviate' the significant concerns in relation to the possibility of privatisation of water services. The Expert Commission also formed the opinion that once these concerns were adequately addressed there was a far greater likelihood that progress could be made 'on important issues such as addressing the serious infrastructural deficit'.

The Expert Commission's recommendation on constitutional protection for the public ownership of the public water system is in no way at odds with Ireland obligations as necessitated by our Membership of the European Union³. This is clear from the Letter issued by the European Commission to the Chairman of the Expert Commission⁴. The European Commission have set out that what is required is the implementation of a water policy which adheres to the two principles of 'cost recovery' and 'polluter pays' to promote responsible use of water, while taking account of important local circumstances and social considerations of the Member State⁵.

The Thirty-fifth Amendment of the Constitution (Water in Public Ownership) (No.2) Bill 2016

The Thirty-fifth Amendment of the Constitution (Water in Public Ownership) (No.2) Bill 2016 was passed at its second reading by the majority of T.Ds in the Dáil on the 9th November 2016.

¹ 10c. Motion *re* Establishment of Joint Committee on the Future Funding of Domestic Water Services DÁIL EIREANN Order Paper, Thursday 24th November 2016

² Expert Commission on Domestic Public Water Services, November 2016, *Report on the Funding of Domestic Public Water Services in Ireland*, Recommendation 5.1 Public Ownership, pg. 31

³ Article 29.4.6^o of the Irish Constitution

⁴ Issued on behalf of the Directorate General, Environment, The European Commission, dated 14 November 2016, Appendix 14, Report on the Funding of Domestic Public Water Services in Ireland

⁵ As set out in the Water Framework Directive, 2000/60/EC

The proposed Constitutional amendment seeks to address significant concerns around possible privatisation of water services which have been strongly expressed by the general public through mass public demonstrations. The public have indicated their desire to have the public water supply protected from future privatisation. This issue as a matter of grave public concern has been reflected within the Report of the Expert Commission on Domestic Public Water Services.

The key aim of the proposed amendment is to provide constitutional protection for the public water supply by solidifying and strengthening the Government's current responsibility in this regard and preventing this responsibility from being re-assigned, devolved or delegated to private interests in pursuit of profit into the future.

The proposed Constitutional Amendment will be examined in detail by another Committee established for this specific purpose.

[The Joint Committee on the Future Funding of Domestic Water Services Request for Written Submissions](#)

A request for a written submission was received on Monday 19th December by email. This submission will be directed towards addressing the following issues as identified and requested by the Joint Committee:

- *the appropriateness of providing constitutional protection*
- *the adequacy of the protection currently provided by existing legislation, including the Water Services Act 2013 and the Water Services Act 2014, in relation to the possible disposal of Irish Water*
- *the risk of unintended consequences of any constitutional protection, including in relation to water supplies owned by individuals and groups⁶*

[1. Importance of Access to Water](#)

Access to water is essential for human life, health and well-being. Therefore the provision of water is taken to be a basic human right and its direct provision should be considered to be a basic function of any State.

The introduction of a market relationship in the delivery of water can rightly be viewed as the first step toward privatisation and commercialisation of water provision and consequently as the first step towards diminishing a person's human right to water⁷. The creation of a primarily commercial type relationship redefines water from being a public good to that of a personal service which can be removed if a person is unable to pay.

It is reasonable to conclude that the threat posed by the pursuit of profit in terms of providing water services amounts to a threat to access by the general public to water.

⁶ Sheridan, T, Clerk to the Joint Committee, Letter issued on behalf of the Joint Committee, received 18th December 2016

⁷ Lynch, K, Professor of Equality, UCD School of Social Justice, 2013, *WATER IS A PUBLIC COLLECTIVE GOOD* available at <http://www.right2water.ie/blog/water-public-collective-good>

A number of cities and countries have gone to significant lengths to re-municipalise their water supply due to rising costs, including; Paris, Buenos Aires, Kuala Lumpur and Bolivia.

International research has identified that 180 cities and communities in 35 countries, including Buenos Aires, Johannesburg, Paris, Accra, Berlin, La Paz, Maputo and Kuala Lumpur, have all “re-municipalised” their water systems in the past decade. More than 100 of the “returnees” were in the US and France, 14 in Africa and 12 in Latin America. Those in developing countries tended to be bigger cities than those in richer countries⁸.

Citizens in Paris saw the cost of water increase by 265% over a 23year period, and when it was re-municipalised €35 million was saved in water charges by the City Council⁹.

“Direct experience with common problems of private water management – from lack of infrastructure investments, to tariff hikes to environmental hazards – has persuaded communities and policymakers that the public sector is better placed to provide quality services to citizens and promote the human right to water,”¹⁰

Due to bankruptcy the City of Detroit in the State of Michigan entered into a public-private partnership with a private contractor to operate the public water system. While it remains in public ownership it is to be operated by Veolia North America. Citizens of Detroit have seen their water supply disconnected and group representing concerned citizens requested the UN to intervene¹¹ on the basis of human rights abuses. *‘Disconnection of water services because of failure to pay due to lack of means constitutes a violation of the human right to water and other international human rights’¹².*

Public Private Partnerships are being used increasingly within the public water system in Ireland. Private companies are *‘providing, operating and managing water and waste-water treatment plants for some of our largest cities and towns’¹³*. With most of these private companies being global corporations which are leading the way in water privatisation internationally.

They now control water and waste-water treatment infrastructure such as the Dublin Ringsend Waste Water Treatment Plant, (treating waste water from over 1.7 million people), the Bray/Shanganagh plant (serving a population of 248,000), Sligo (serving 80,000), Waterford (180,000), and plants in Cork, Tipperary, Offaly, Meath, and Donegal, amongst others.

According to Dail records there are, in fact, 115 of these PPP contracts to Design, Build, Operate and Maintain (DBO), water and waste-water treatment plants across 232 sites in Ireland. The

⁸ Transnational Institute (TNI), Public Services International Research Unit, 2015, *Our Public Water Future, The Global Experience with remunicipalisation*, Published by Transnational Institute (TNI), Public Services International Research Unit (PSIRU), Multinationals Observatory, Municipal Services Project (MSP) and the European Federation of Public Service Unions (EPSU)

⁹ Lynch, K, Professor of Equality, UCD School of Social Justice, 2013, *WATER IS A PUBLIC COLLECTIVE GOOD* available at <http://www.right2water.ie/blog/water-public-collective-good>

¹⁰ Transnational Institute (TNI), Public Services International Research Unit, 2015, *Our Public Water Future, The Global Experience with remunicipalisation*, Published by Transnational Institute (TNI), Public Services International Research Unit (PSIRU), Multinationals Observatory, Municipal Services Project (MSP) and the European Federation of Public Service Unions (EPSU)

¹¹ Valdovinos.J, 2015 *Transnational corporations in Water Governance. Veolia and Suez in Mexico and the United States (1993-2014)*. Geography. Universit´e Sorbonne Paris Cit´e,. English

¹² United Nations Human Rights, 2014 cited by Valdovinos.J, 2015, *Transnational corporations in Water Governance. Veolia and Suez in Mexico and the United States (1993-2014)*. Geography. Universit´e Sorbonne Paris Cit´e, English, pg 295.

¹³ Dr. Heane, R, (2016) *PUBLIC PRIVATE PARTNERSHIPS ARE ALREADY PRIVATISING OUR PUBLIC WATER SYSTEM* available at <http://www.right2water.ie/blog/public-private-partnerships-are-already-privatising-our-public-water-system>

contracts are worth a massive total of €1.4bn and most are set to run up to 2030. It is estimated that Irish Water (previously the local authorities) are paying out €123 million per annum to the private companies to cover the operation/maintenance/repayment costs of these PPP contracts¹⁴.

There are clearly a number of paths to privatisation.

2. Adequacy of Existing Protection

2.1 Water Services Acts 2007, 2013, 2013 no. 2 and 2014.

The Water Services Act 2007 [hereafter known as the 2007 Act] initially set up water authorities with functional areas, its purpose was to consolidate existing water services legislation and provide for the licencing of water services. The functions and powers of water service authorities were set out in the legislation under Sections 31 and 32 respectively.

The Water Services Act 2013 [here after known as the 2013 Act) created the vessel to which functions created for water authorities (local authorities) under the Water Services Act 2007 could transfer. This vessel was established in form of a company now a Designated Purpose Company Limited by Shares under the Companies Act 2014. This new company would be a subsidiary of Bord Gais na hEireann (now Ervia) to be called Irish Water. It was prescribed that the Memorandum and Articles of Association of Irish Water were to be consistent with this Act. The legislation also provides the legal basis for Irish Water to install and maintain water meters in dwellings.

The Water Services Act 2013 (No. 2) [hereafter known as the 2013 Act No. 2] provided primarily for the transfer of functions and property from the water authorities provided for under the 2007 Act to Irish Water under sections 7 and 10 respectively. The 2013 Act No. 2 also provided Irish Water with the power to charge for water.

The Water Services Act 2014 [hereafter known as the 2014 Act] was enacted to provide for the statutory requirement of a plebiscite for any proposal to go before either houses of the Oireachtas on alienating the sharing holding of Ervia, the Minister for the Environment, Community and Local Government [hereafter known as the Minister] and the Minister for Finance. It also provided a cap on water charges and the provision of a grant and inter alia the setting up of a public water forum.

2.2 Statutory Prohibition on the Alienation of the Shareholding in Irish Water

The Share capital of Irish Water is valued at €1,000,000 divided into 50,000,000 A Shares of €0.01 each and 50,000,000 B Shares of €0.01 each.

Section 5 of the 2013 Act provides that the shareholding of Irish Water will be divided amongst Ervia, The Minister and the Minister of Finance, with one share with voting rights going to Ervia and the remainder divided between the two Ministers with no voting rights. Initially there wasn't a prohibition on the alienation of the shares only that Ervia could not alienate it's share without the consent of the two

¹⁴ Dr. Heane, R, (2016) PUBLIC PRIVATE PARTNERSHIPS ARE ALREADY PRIVATISING OUR PUBLIC WATER SYSTEM available at <http://www.right2water.ie/blog/public-private-partnerships-are-already-privatising-our-public-water-system>

Ministers. This was amended by Section 46 of the Water Services Act No. 2 to provide that neither Ervia nor the two Minister could alienate their shareholding.

Section 2 of the 2014 Act provides that a public plebiscite must be passed in favour of selling the shareholding of Irish Water before a Bill allowing for such could be enacted into law.

The Constitution of Irish Water (Memorandum and Articles of Association) under the Companies Act 2014 reflects the statutory prohibition on the alienation of shares and plebiscite requirement as it must be in keeping with Water Services legislation. However, both the requirement of non-alienation of shares and the requirement of a plebiscite can be removed by subsequent amending legislation, meaning the statutory protection on the shareholding can be undone by the consent of current or future governments.

More concerning are the wide powers given to Irish Water under its own Memorandum of Association in terms of disposing of assets, or transferring of assets under contract to private interests. Also borrowing against the assets means that the assets can be taken legally in satisfaction of a debt. Only Ministerial approval is required for the exercise of some but not all of these powers.

2.3 Irish Water Powers – Alienation of Assets by Sale, Transfer or Other Means

The powers which had been provided under statute for the water authorities under section 31 of the 2007 Act would not seem to have been transferred and most were deleted. Section 7(2) of 2013 Act No. 2 provides that references to a water services authority under the 2007 Act in so far it related to functions transferred under the 2013 Act No. 2 would be construed as reference to Irish Water. Therefore references to a ‘water services authority’ in Section 31 of 2007 Act still remain as reference to local authorities.

The powers of Irish Water outside of the power to charge instead of being set out in statute are set out in Irish Water’s Memorandum of Association along with the objects of the company. The powers may be used in pursuit its objects which include inter alia of carrying out its functions under the 2013 Act, the 2013 Act No. 2 and the 2014 Act *or and any other enactment from time to time conferring functions on the Company*¹⁵.

In the 2007 Act provision was made under Section 31(12)(a) *preventing any is or arrangement to be entered into with another person other than a group water services scheme or another water services authority which would involve the transfer of a water services authority’s assets or infrastructure*, or any part of such assets or infrastructure or which prevented the transfer of the assets provided by the person as part of such an agreement to a water services authority. This was amended by Section 45(3)(c)(i) and Section 45(24) 2013 Act No. 2 deleting ‘*other than a group water services scheme or another water services authority*’. This then meant that a water services authority could not enter into any agreement where assets or infrastructure were transferred to another person. The transfer of all property of the water services authorities were transferred to Irish Water under Section 12 of the 2013 Act No. 2.

This restriction on transferring assets or infrastructure was not replicated in the 2013 Act, the 2013 Act No. 2 or the 2014 Act. In fact it would seem that under Clause 4 of the Constitution of Irish Water (the Memorandum and Articles of Association) wide powers have been provided in relation to disposing of assets or transfer by another means e.g. providing for use subject to

¹⁵¹⁵The Constitution of Irish Water, Memorandum of Association, Clause 3.1

contract. The exercising of some powers would require ministerial consent/approval under Clause 7, with the only prohibition on the Ministerial approval/consent being in relation to selling shares in Irish Water:

The powers exercisable by the Company in contemplation or in furtherance of the objects listed in clause 4 are:

- (1) *To acquire, lease, hire, construct, lay, extend, erect, provide, operate, maintain, improve, alter, enlarge, protect, repair and replace, **whether for use by the Company or a person other than the Company**, such land, buildings, easements, vehicles, works (including waterworks and waste water works), services, machinery, facilities or other things as are necessary or expedient in relation to, or ancillary to, the provision, development, maintenance and operation of water services infrastructure and the abstraction, treatment, use, storage, measurement, supply, distribution, collection or disposal of water or waste water and to attach such terms and conditions as may be thought fit to any service or facility provided by the Company [emphasis added].*
- (2) *To manufacture, purchase, acquire, finance, **sell**, hire, lease, supply, place, construct, lay, connect, install, test, repair, maintain or remove water services infrastructure including meters and all related accessories, fittings and appliances.[emphasis added]*

Powers 1 and 2 Under Clause 4 clearly provide that Irish Water can invest in the public water system or aspects thereof and the products of such investments could be used by Irish Water or another entity entirely. The power to sell water services infrastructure is also present.

- (4) *To appoint and **act through any agents, administrators, contractors** or delegates in any part of the world in connection with the undertaking and business of the Company on such terms and subject to such conditions as may be thought fit.*

The use of contractors to carry on the undertaking and business of Irish Water under conditions it thinks fit, as in the use of public private partnership contracts being used currently.

- (7) *To purchase, lease or by any other means acquire and take options over any freehold, leasehold or other property for any estate or interest whatever, and any rights, privileges or easement over or in respect of any property, and to buy, acquire, **sell**, manufacture, repair, convert, alter, take on hire, let on hire and deal in any buildings, offices, factories, mills, **works**, wharves, roads, railways, tramways, machinery, engines, rolling stock, **plant**, implements, tools and vessels, goods or things of any description, and any real or personal property or rights whatsoever.*

The buying and selling of any property, interests therein or plant and works etc is provided for, this would not seem to preclude the buying and selling of existing assets which take any form set out above.

- (11) *Subject to the provisions of clause 7 of this Memorandum of Association, to raise or borrow money (including by raising money on the capital market through borrowing and capital increase, the creation and issue of finance leases, notes, bonds, debentures, debenture stock or other securities of any description) for the benefit of the Company or any subsidiary of the Company (and whether with or without consideration or benefit) and to pay interest and other charges on any borrowings and **to give security or other collateral for the same, on such terms and in such manner as may be thought fit** (and whether with or without consideration or benefit) including by means of personal covenant of the Company, or by mortgage, charge*

*(in each case, whether legal or equitable, fixed or floating), lien, pledge, assignment, trust or the issue of notes, bonds, debentures, debenture stocks or other securities or any other means involving **the creation of security over all or any part of the undertaking, assets, property, rights, goodwill, uncalled capital and revenues of the Company** of whatever kind both present and future or by any other means of collateralisation or security **including by way of transfer of title to any of such undertaking, assets, property, rights, goodwill, uncalled capital and revenues** [emphasis added].*

- (13) *Subject to the provisions of clause 7 of this Memorandum of Association, to secure or otherwise collateralise on such terms and in such manner as may be thought fit, any indebtedness or obligation of the Company (and whether with or without consideration or benefit), including by means of personal covenant of the Company, or by mortgage, charge (in each case, whether legal or equitable, fixed or floating), lien, pledge, assignment, trust or the issue of notes, bonds, debentures, debenture stocks or other securities or any other means involving the creation of security over all or any part of the undertaking, assets, property, rights, goodwill, uncalled capital and revenues of the Company of whatever kind both present and future or by any other means of collateralisation or security **including by way of transfer of title to any of such undertaking, assets, property, rights, goodwill, uncalled capital and revenues.***

Subject to Ministerial approval/consent Irish Water can borrow against any of its assets including debt owed to Irish Water which means in practical terms where such borrowings are unpaid these assets could be acquired by the lender in satisfaction of the loan.

- (19) *Subject to the provisions of clause 7 of this Memorandum of Association, **to enter into and carry into effect any arrangement for joint working in business, or for sharing of profits, or for amalgamation, with any other company or association, or any partnership or person, carrying on any business or proposing to carry on any business within the objects of this Company** and to co-operate or participate in any way with or to take over or assume any obligation of, or to assist, any person.*

Subject to Ministerial approval/consent joint ventures with private enterprise in any time of arrangement are provided for.

- (20) ***To obtain** any Ministerial Order or licence, statutory consent or other approval from any competent authority or **any provisional order or Act of the Oireachtas or parliament of any other relevant jurisdiction or Charter for enabling the Company to carry any of its objects into effect, or for any other purpose which may seem expedient, and to oppose any proceedings or applications which may seem calculated directly or indirectly to prejudice the Company's interests.***

The company can seek the Oireachtas to pass legislation to allow it to carry any of its objects into effect, or in the interests of expediency to oppose anything actions which are not in the company's interests, this is potentially as distinct from the Irish public's interests!!

- (28) *Subject to the provisions of clause 7 of this Memorandum of Association, **to sell, exchange, mortgage, charge, dispose of, let, exchange, turn to account, grant licences, easements, options, servitudes and other rights and privileges over, and in any other manner deal with all or any part of the undertaking, property and assets (present and future) of the Company on such terms as may be thought fit and in particular either with or without the Company receiving any consideration or benefit.** [emphasis added]*

Subject to Ministerial approval/consent Irish Water can sell, dispose or, let or grant rights over any part of its undertaking, assets in any manner the company thinks fit and potentially for no economic or material benefit!

At the end of the comprehensive list of powers (1-33) provided under Clause 4 the following is provided for:

PROVIDED however that none of the foregoing shall permit the allotment, issue, transfer, mortgage, charge, lien or pledge of shares in the capital of the Company including its uncalled capital, except in the case of an allotment, issue or transfer of shares which is in accordance with the Water Services Acts, specifically section 5 of the Water Services Act 2013 (as amended) and section 2 of the Water Services Act 2014, and the Articles of Association of the Company (including any requirements imposed thereby to obtain Ministerial Consent).

And it is hereby declared that in the interpretation of these presents, the meaning of any of the Company's powers shall not be restricted by reference to any other power, or by the juxtaposition of two or more powers, and that, in the event of any ambiguity, this clause shall be construed in such a way as to widen, and not to restrict, the powers of the Company.

2.4 Conclusion

Existing protections are wholly inadequate. The only act that is prohibited under Statute and in the Memorandum of Association of Irish Water is the alienation of the share capital, which is only valued at €1,000,000 in total. The requirement for a plebiscite is a statutory requirement also. These requirements can be undone by the consent of a government with a majority in Dáil Eireann, using statutory amendments to remove them.

Previous governments have sold shareholdings in various former public sector companies which have in certain cases resulted in detrimental consequences for the public e.g. sale of Eircom. This sale gave rise to a serious lack of investment in key technological infrastructure which hindered greatly investment by industry into areas of the country not supported by broadband¹⁶ but in dire need of job creation.

More importantly; what is of value is the assets of Irish Water i.e. the public water system; the sale and transfer of which can currently occur or part thereof through the Irish Water exercising its wide powers, which in some instances are not even subject to ministerial approval/consent. These transactions can be for no consideration or benefit and the powers can only be widened in the cases of conflicting interpretations.

There is no statutory prohibition or otherwise on the sale or transfer of the assets of Irish Water in fact to do so is clearly provided for in the company's own Constitution. Public private partnership contracts are already being used and parts of the public water system are now being managed, operated and maintained by private companies for profit. The key assets of the public water system can be sold, or transferred under contract to private interests leaving a shell company in public ownership. This offers no real protection to the public in terms of privatisation of the public water system.

3. Appropriateness of Constitutional Protection

3.1 Appropriate Legal Mechanism and the Appropriate Decision Makers

¹⁶ Duggan, V. 2013, *Ireland's Investment Crisis: Diagnosis and Prescription*, Nevin Economic Research Institute (NERI)

Access to water is essential to public health. Privatisation of water poses a serious threat to access and quality. The only legal mechanism we have that would ensure a government is prohibited from acting against the best interests of the public is the provide for a Constitutional prohibition by making the Government clearly responsible to own, manage and maintain the public water system.

This is the key aim of the The Thirty-fifth Amendment of the Constitution (Water in Public Ownership) (No.2) Bill 2016 was passed at its second reading by the majority of T.Ds in the Dáil on the 9th November 2016.

There is currently no protection from a State who wishes to sell natural resources and public assets to private enterprise in its own interest but against the best interests of the Irish people¹⁷.

The Preamble of the Irish Constitution professes that the people gave themselves the Constitution and Article 6 provides that:

'all powers of the government, legislative, executive and judicial derive under God from the people, whose right it is to designate the rulers of the State and, in final appeal to decide all questions of national policy, according to the requirement of the common good'.

The Irish people have strongly vocalised their concern and opposition regarding privatisation of water and water charges. This formation of the Expert Commission on the Future Funding of Domestic Water Services on whose report is being considered by this Committee is as a direct result of political pressure created by the people in relation to this issue. In line with the Constitution that provides this '*overarching constitutional structure*¹⁸' the people have appealed to decide this issue in relation to their own Constitution by way of a referendum.

A constitutional amendment is a '*particularly solemn legislative process*' where the people and the Oireachtas take part¹⁹. It is clear the public wish to take part in such a process to decide the policy in the area of water going forward and in particular to prevent privatisation. In the last analysis it is the people themselves who are the guardians of the Constitution²⁰

3.2 Relevant Existing Provisions of the Irish Constitution

Article 10.3^o provides:

Provision may be made by law for the management of the property which belongs to the State by virtue of this Article and for the control of the alienation, whether temporary or permanent, of that property

There is no conflict between Article 10 and a proposed Constitutional amendment to prevent privatisation of the public water system since provision is clearly made for the '*control of alienation*'; it is permissible that control can be excised to prevent alienation. Interestingly Article 11 of the 1922

¹⁷ Rossa Phelan, Dr., *Can the State Sell the Nation*, E. Hobbs, Own Our Oil - The Fight for Irish Economic Freedom, Liberty Press, 2014, 120

¹⁸ Supra, 129

¹⁹ Carroll. J in *Roche v Ireland*, The High Court, June 17 1983

²⁰ Rossa Phelan, Dr., *Can the State Sell the Nation*, E. Hobbs, Own Our Oil - The Fight for Irish Economic Freedom, Liberty Press, 2014, 12

Constitution provided far greater protection in that the alienation of lands and natural resources including mines and minerals was prohibited.²¹

The importance of protecting key public resources/assets and ensuring access was clearly set out in the Social Directives provided for under Article 45.3^o as follows:

ii That the ownership and control of the material resources of the community may be so distributed amongst private individuals and the various classes as best to subserve the common good.

iii That, especially, the operation of free competition shall not be allowed so to develop as to result in the concentration of the ownership or control of essential commodities in a few individuals to the common detriment.

Article 28 deals with the Executive arm of the State and provides that it is collectively responsible to Dáil Éireann. The powers and responsibilities of central and local government as set out within Article 28.

The Thirty-fifth Amendment of the Constitution (Water in Public Ownership) (No.2) Bill 2016 aims to assign a clear responsibility on the Executive (the Government) to ensure the public water system remains in public ownership, management and maintenance. The assignment of particular responsibilities on the Executive has occurred already within the Constitution. Art 29.4.1^o assigns the Executive with the power and responsibility in relation to external affairs of the State. Where a clear responsibility is placed on the Executive, any failure to uphold it would be considered justiciable.

Consequently, in my opinion, the Courts have no power, either express or implied, to supervise or interfere with the exercise by the Government of its executive functions, unless the circumstances are such as to amount to a clear disregard by the Government of the powers and duties conferred upon it by the Constitution...

the example of a declaration of war by the Government without the assent of Dáil Éireann, in clear breach of the provisions of Article 28, s. 3 of the Constitution, as being a circumstance in which the Court would be bound to intervene to protect a citizen against what would undoubtedly be an invasion of his rights and a justiciable matter²².

Assigning responsibilities to the Executive is more has the potential to be more effective and precise than a rights-based approach by inserting rights into Article 40 which can be problematic, in terms of the Separation of Powers doctrine and non-justicability especially in relation to resource based decisions, the limiting of rights and the balancing of rights which can come into conflict.

3.3 Conclusion

The Constitution is the appropriate legal mechanism to ensure the provision of water is protected from privatisation into the future and it is clear that it is for the people to decide whether they wish to amend their Constitution in this manner, on a critical matter of public policy which is of grave public concern.

²¹ Rossa Phelan, Dr., Can the State Sell the Nation, E. Hobbs, Own Our Oil - The Fight for Irish Economic Freedom, Liberty Press, 2014, 120

²² Griffin, J Crotty v An Taoiseach & Ors High Court 1. I.R. 713 [1987] citing Buckley & Others (Sinn Féin) v. Attorney General [1950] I.R. 67

4. Group Water Schemes, Private Wells and Private Water Infrastructure

4.1 Private Wells

A private well is a well that is privately owned and provides water to a single house and does not provide water to the public through a commercial or social activity²³. Private wells are also not regulated by the Government under the European Communities (Drinking Water) Regulations 2014²⁴.

Irish Water has no role to play in abstractions relating to private water supplies. Water charges do not apply to private well owners so long as they are not also connected to a public water supply²⁵.

The legal basis for the use of private wells is generally dealt with as part of the planning application process for both domestic and commercial buildings. The question of private supplies or Group Water Schemes generally arises where it is not economically or technically feasible to expand the public network to the area concerned consideration has to be given to the appropriate arrangements for water services and is generally addressed as a condition of planning permission²⁶.

4.2 Group Water Schemes

A Group Water Scheme (GWS) is defined as:

“A scheme providing a private supply of water to two or more houses by means of a common or shared source of supply and distribution system”²⁷

Private water schemes exist by virtue of the fact that the public water system was not extended into certain rural areas²⁸. Supporting local communities to set up their own privately owned schemes was considered to be a much more viable alternative to the extension of the public water scheme²⁹.

The Department of Environment, Community and Local Government has identified that due to rural living patterns with low population density water services in Ireland can be divided into three main categories:

- (a) *Public systems covering the majority of the population;*
- (b) *Co-operative groups delivering mainly drinking water services in rural areas (Group Water Schemes) largely in areas, where the topography and rural location*

²³ Environmental Protection Agency, 2017, Protecting your Private Well, available at <https://www.epa.ie/water/dw/hhinfo/protprivwell/>

²⁴ Ibid

²⁵ Ibid

²⁶ Department of the Environment, Community and Local Government, 2015, Paper 1- Overview of the Water Sector in Ireland, Submission requested by the Central Statistics Office, pg. 3

²⁷ Department of the Environment, Community and Local Government, May 2015, *Explanatory Memorandum Subsidy towards the Operational Costs of Group Water Schemes* available at www.housing.gov.ie/sites/default/files/migrated.../Water/FileDownload,42412,en.do

²⁸ National Federation of Group Water Schemes (NFGWS), *Background to the GWS Sector*, available at <http://www.nfgws.ie/About-the-NFGWS/Background-to-the-GWS-sector>

²⁹ Ibid

has historically made provision of public infrastructure unviable; and
(c) *Individuals who are remote from public or group systems, reliant on their own wells and single house waste water treatment systems (e.g. septic tanks)*³⁰.

The legal basis of a GWS is generally by either administrative permission, approval or under licence provided by statute. Water Services Act 2007 enacted to consolidate existing water services legislation and a new licencing system of all water services being carried was supposed to occur under it. But the latter has yet to occur³¹. Transitional and saving arrangements are provided for previous permissions and licences granted³².

GWS's are clearly distinguishable from the public water system in terms of their ownership. They are required to be a co-operative, a trust or a company but are usually a co-operative as a separate legal entity to members who receive a water supply. The infrastructure, which can include distribution systems only where a GWS receives water from the public system, or also a treatment facility where they water is from a private source, are privately owned assets by a distinctly private legal entity with an identifiable membership. The membership agreement between those being supplied and the legal entity is governed by private contract law³³.

GWSs do receive subsidies paid through the local authorities. GWS must meet certain requirements to qualify for subsidies including and in particular that it must be:

*.....properly constituted (i.e. it must be a trust, co-operative or limited company. Co-operatives and limited companies must be constituted in a way that recognises the Group Water Scheme members as the owners of the group water scheme*³⁴)

From an operational perspective, Irish Water and local authorities are in a position to distinguish what constitutes the public water system and what makes up private parts of the water system in terms of the extent of their responsibilities.

*It should also be noted that under Statute, Group Water Schemes can request that Irish Water take over their assets, from which point Irish Water's tariffs structure, as set out by the CER, would apply to the customers of that Scheme*³⁵.

In order for a GWS to become part of the 'public system' they have to be taken in charge, which provides for the transfer of ownership. This can be done on voluntary basis under Section 95(1) of the 2007 Act which provides:

³⁰ Department of the Environment, Community and Local Government, 2015, Paper 1- Overview of the Water Sector in Ireland, Submission requested by the Central Statistics Office, pg. 2

³¹ Supra, pg. 3

³² Section 64, Water Services Act 2007

³³ National Federation of Group Water Schemes (NFGWS) , *Charter of Rights and Responsibilities*, available at [http://www.nfgws.ie/kfmgetfull/fckeditor/File/Charter%20of%20Rights%20\(revised%202010\).pdf](http://www.nfgws.ie/kfmgetfull/fckeditor/File/Charter%20of%20Rights%20(revised%202010).pdf)

³⁴ Department of the Environment, Community and Local Government, 2015, *Explanatory Memorandum Subsidy towards the Operational Costs of Group Water Schemes*, pg. 5

³⁵ Department of the Environment, Community and Local Government, 2015, Paper 1- Overview of the Water Sector in Ireland, Submission requested by the Central Statistics Office pg 4

A water services authority may by agreement take into public charge or acquire all or part of a waterworks or waste water works, or any rights connected to it, whether or not it is situated in its functional area, where not fewer than two thirds of those persons entitled to dispose of it agree to such transfer.

In the interests of public health a GWS can be taken into charge without consent on a temporary basis under Section 91 of the 2007 Act or on a permanent basis under a compulsory purchase order under Section 96. The determination of compensation is also provided for under Section 96 of the 2007 Act.

More recently it is clear from the EU Directive on procurement of entities operating in the utilities sectors³⁶ including water that makes particular provision for the recognition of entities distinct from the State, public bodies, public undertakings and from private contractors which are providing water due to being awarded a public procurement contract to do so³⁷. The Directive recognises a person (legal entity) that is none of the above but pursues one of the activities in water, energy, transport or postal services, *'or any combination thereof and has been granted special or exclusive rights by a competent authority of a Member State'*³⁸. GWSs clearly fall within this category since they have special or exclusive rights granted by the State to provide water to a defined region and membership providing clear distinction from public entities and private contractors procured by public entities.

4.3 Private Property Rights under the Irish Constitution

The following Articles of the Constitution relate to the protection of private property rights:

Article 43

1.1° The State acknowledges that man, in virtue of his rational being, has the natural right, antecedent to positive law, to the private ownership of external goods.

1.2° The State accordingly guarantees to pass no law attempting to abolish the right of private ownership or the general right to transfer, bequeath, and inherit property.

2.1° The State recognises, however, that the exercise of the rights mentioned in the foregoing provisions of this Article ought, in civil society, to be regulated by the principles of social justice.

2.2° The State, accordingly, may as occasion requires delimit by law the exercise of the said rights with a view to reconciling their exercise with the exigencies of the common good.

Article 40.3.2°

The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.

³⁶ EU Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in water, energy, transport, and postal services sectors

³⁷ EU Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in water, energy, transport, and postal services sectors, transposed by the S.I 286/2016 EUROPEAN UNION (AWARD OF CONTRACTS BY UTILITY UNDERTAKINGS) REGULATIONS 2016, Regulation 5 (3)

³⁸ Supra Regulations 2, 4 and 5.

Property rights can be limited where the State is pursuing a social justice principle³⁹. However, it cannot amount to an 'unjust' attack, in practice this means that the decision should be inter alia made in accordance with fair procedures, be proportionate to the objective being pursued, and the provision of compensation reduces the risk of an interference amounting to an unjustified attack⁴⁰. In terms of GWS, it is clear from the 2007 Act, the private property rights of members of GWSs are recognised in line with the Irish Constitution. Any amendment to the Constitution would have to be read in conjunction with the above cited Articles which provide for the protection of private property rights of GWSs, and prohibit any unjust attack on same.

4.4 Private Water Infrastructure

The regulation of buildings in terms of planning permission also covers private water infrastructure required as part of private dwellings and commercial buildings. This infrastructure is privately owned as part of such properties. Such privately owned infrastructure is connected to either the public water system, a privately owned well or a Group Water Scheme.

4.5 Conclusion

Private wells and GWSs are clearly distinguishable from the public water system. If GWSs were part of the public water system, there would be no need for the provision for the transfer of ownership in order for them to become part of the public system by being taken in charge voluntarily or otherwise. Their privately held assets and associated rights are also protected under Articles 40 and 43 of the Constitution. The same principals apply to private water infrastructure in dwellings and commercial buildings, as they are equally privately owned.

³⁹ Whyte, G. 2012, PROPERTY RIGHTS OF CREDITORS AND THE PUBLIC INTEREST , FLAC Conference, citing Peart J in Shirley v. O'Gorman, 31 January 2006, High Court

⁴⁰ Supra, citing Murray CJ, Re Article 26 and the Health Amendment (No.2) Bill 2004 [2005] 1 I.R. 105 at p.201